

February 21, 2023

Administrator Shailen Bhatt
Federal Highway Administration
1200 New Jersey Ave SE
Washington, DC 20590-0001

**Re: Notice of Revised Stewardship and Oversight Agreement Template, Request for Comments,
Docket No. FHWA-2022-0013**

Dear Administrator Bhatt,

The Oklahoma Department of Transportation (ODOT) is providing comments and concerns in response to the Request for Comments on the Notice of Revised Stewardship and Oversight Agreement Template, (herein after referred to as S&O Agreement) published on December 21, 2022. As the State Highway Agency responsible for administering the federal transportation program in Oklahoma, in the manner and practice appropriate to serve our citizens of our state, we trust that these comments will be carefully considered.

Each state, unique in its structure, administration, priorities, opportunities and challenges, has the responsibility to meet the need of its citizens and economies. We believe that Congress explicitly recognizes this fact in the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58, Section 11306(c)(3)(e) COMPLIANCE WITH NON-STATUTORY TERMS.

(1) IN GENERAL - The Secretary shall not enforce or otherwise require a State to comply with approval requirements that are not required by Federal law (including regulations) in a Federal-State stewardship and oversight agreement.

(2) APPROVAL AUTHORITY Notwithstanding any other provision of law, the Secretary shall not assert approval authority over any matter in a Federal-State stewardship and oversight agreement reserved to States.

Our review of the proposed revised stewardship and oversight agreement template is through this lens.

General Comments:

- We believe Congressional Intent is to reduce burdens on both the states and the USDOT, as demonstrated by:
 - Section 11307(c)(2), which requires USDOT to justify the retention of requirements not in statute or rule
 - Section 11307(b)(3)(B), which requires the Secretary to requests comments on adjusting review schedules and processes to apply risk-based approaches to oversight, indicating that low risk activities could be subject to less frequent review and oversight; and
 - Section 11307(f), which amends 23 USC 106(g)(3) to strike the requirement for certain matters to be reviewed by USDOT on an “annual” basis and essentially calls for a new general rule of biennial reviews unless needed more frequently for a specified reason.

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- We welcome proposed modifications to the S&O Agreement template that move the oversight of project responsibilities that are traditionally handled by FHWA toward more risk-based approaches, as it will lessen the burden on both states and FHWA. The new template should enable FHWA to meet its oversight responsibilities consistent with Congressional intent, while preserving the ability of states to address their own needs and state requirements.

Specific Concerns:

- Regarding oversight under 23 USC 106(g), We have concerns about the introduction of the proposed “stewardship and oversight plan,” which is mentioned in Sections IV, V, and VI, but is not defined in the template. This plan allows the FHWA Division Office, at its sole discretion, to supersede the delegation of responsibilities to the state for specific projects or even entire programs. In addition to not clearly defining this new plan, the template does not provide any limits on the scope, content, or frequency with which these plans might be used. The frequent use of individual plans for projects or programs will lead to confusion over roles and responsibilities, and the potential for project delays and increased costs due to this confusion. More definition needs to be provided on this situation, including why and how often it might be used (preferably in rare instances), and the state should have input into the development of this plan. In addition, the existence of plan for a specific project is not merely a threshold that would make program wide assumption of a responsibility inapplicable, the existence of a plan should supersede that assumption “when and only to the extent” of the project specific plan.
- Regarding S&O templates, they should be allowed to be modified by individual division offices and State DOT’s. We advocate for that flexibility as we believe it is necessary to be able to modify the agreement to address such aspects as specific state responsibilities or delegation on subrecipient projects. One size will not fit all.
- We have serious reservations and concerns regarding the statement:
“The [state DOT] is to exercise any and all assumptions of the FHWA’s responsibilities in accordance with the Federal laws, regulations, policies, Executive Orders, and procedures that would apply if the responsibilities were carried out by FHWA. For all projects and programs carried out under title 23, the [state DOT] will comply with title 23 and all applicable non-title 23 Federal-aid program requirements.”

We strongly object to the statement specifically to the expansion of the assumption of responsibilities to include Executive Orders and procedures, for the following reasons:

- Before FHWA implements an Executive Order, a directive or policy for its implementation is required. Thus, there is no need to include “...Executive Orders, and procedures that would apply if the responsibilities were carried out by FHWA...,” as these will be covered in FHWA policies.
- There have been many examples of Executive Orders that conflicted with existing federal regulations and required further analysis before implementation.
- Where a policy is a course or principle of action by an organization, procedures are detailed mandatory steps. Means and methods for accomplishing regulations and policies are varied based on specific circumstances in each state. We object to the expansion of requirements to include “EO’s and procedures that would apply if the responsibilities were carried out by FHWA”. Regulations and policies are sufficient and appropriate requirements. Requiring internal FHWA procedures is contrary to

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Section 11306(c)(3)(e), “(t)he Secretary shall not enforce or otherwise require a State to comply with approval requirements that are not required by Federal law (including regulations) in a Federal-State stewardship and oversight agreement.”

- Procedures for processing updates to FHWA-State DOT S&O Agreements should not be arbitrary such as the proposed maximum of six years as noted in Section IX. Several states have already updated their S&O agreements since 2015 and, where needed, modifications and amendments can be made per Section VIII to keep an existing agreement current with incremental changes to Federal requirements. Additionally, are concerned that the proposed template allows FHWA too much authority to take such actions as requiring an S&O Agreement to be replaced in its entirety at the request of the Office of Infrastructure (Section VIII.C.) or terminating an agreement “at any time” (or immediately in an “extraordinary circumstance”) if the FHWA Division Office deems it no longer “in the public interest.” The template contains no indication as to what situation might give rise to such terminations, and actions such as these could be catastrophic to the delivery of federal-aid projects and programs in a given state, as the Federal government would not likely be in a position to quickly take over these responsibilities. This section is vague and indicates a level of mistrust that does not serve to foster a cooperative relationship needed to ensure a successful joint agreement. Decisions on the termination or replacement of an agreement should be made jointly between the state DOT and FHWA.
- The specificities of subrecipient oversight vary by State. As such the state DOT and the division office should have flexibility to customize the terms fit the needs of the state. This section could be improved by allowing States to oversee subrecipients based on a project’s risk and the subrecipient’s available resources, provided it is documented and agreed upon by the division office, the State, and the subrecipient. In addition, the template does not make any specific reference to the wider range of potential subrecipients anticipated in various programs within the IIJA. For example, the National Electric Vehicle Infrastructure (NEVI) program will involve a new set of private sector partners and stakeholders in the development of an EV infrastructure network. The S&O Agreement template should allow for attachments or other means of addressing the delegation of responsibilities to and oversight of non-traditional subrecipients.
- We have a concern regarding the potential volume of information that a state DOT could be required to provide to the Division Office “upon request” related to carrying out its responsibilities. Language limiting the information to what is considered relevant would be welcome.

Comments on the Attachments:

- For some items in Attachment A, “Project Action Responsibility Matrix,” there should be a distinction made between responsibilities on Interstate facilities and those on other NHS facilities.
- Attachment A should include all items that must be retained by FHWA as well as those that can be delegated per law or regulation, for clarity. This list could be updated based on the findings of risk-based reviews by the State DOT and division office.
- We agree with the deletion of approval by the Secretary for any policies, procedures, process or manuals or other state action if Federal Laws do not require approval. FHWA will have the opportunity to review State’s procedures and manuals but States should not require a formal approval of these. According to Section VII of the template, the State DOT is responsible for demonstrating to FHWA how it is carrying out its responsibilities in accordance with the

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Agreement and the State name DOT will provide information to the FHWA Division Office upon request. As such there is no need for FHWA to provide formal approval of the State's policies, procedure, processes or manuals unless federal law specifically requires it. We suggest Attachment B include, "Manuals, Agreements, Control, Monitoring, and Reporting Documents," a listing of all manuals and processes that must be approved by FHWA per law or regulation, from which state DOTs and FHWA Division Offices could indicate those that are applicable to their state. The State may modify such listed documents though must provide notice to FHWA of any such updates and provide a copy of such upon request.

In conclusion, Oklahoma DOT appreciates the opportunity for input, and encourages the Template be revised to meet the Congressional Intent to ease bureaucratic burdens on both the states and the FHWA and to ensure the flexibility required to meet the varied needs and realities of each state in the delivery of the federal transportation program. We request that existing S&O Agreements to remain effective until a new superseding S&O Agreement is executed and if needed allow for extensions of the existing agreement as a minor amendment by the state DOTs and division offices.

If you have questions on these comments, please contact Ms. Dawn Sullivan, Deputy Director, P.E., ODOT's Deputy Director, at (405) 521-4768, dsullivan@odot.org.

Sincerely,



Tim J. Gatz
Executive Director